

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KALOMO BHOKE COHEN,

Defendant-Appellant.

UNPUBLISHED
December 1, 2000

No. 214032
Macomb Circuit Court
LC No. 97-003193-FH

Before: Collins, P.J., and Jansen and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of possession of another's financial transactional device without consent. MCL 750.157n(1); MSA 28.354(14)(1). Defendant was sentenced to three concurrent terms of two to fifteen years' imprisonment. He appeals as of right and we affirm.

Defendant first argues that there was insufficient evidence of intent to defraud or cheat the deviceholder for a rational jury to find him guilty beyond a reasonable doubt. When determining whether sufficient evidence has been presented to sustain a conviction, this Court must view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992).

MCL 750.157n(1); MSA 28.354(14)(1) provides:

A person who steals, knowingly takes, or knowingly removes a financial transaction device from the person or possession of a deviceholder, *or who knowingly retains, knowingly possesses, knowingly secretes, or knowingly uses a financial transaction device without the consent of the deviceholder*, is guilty of a felony. [Emphasis added.]

This Court has held that this is a specific intent crime, "given that knowledge is an essential element." *People v Ainsworth*, 197 Mich App 321, 325; 495 NW2d 177 (1992); see also CJI2d 30.3. "Specific intent is defined as a particular criminal intent beyond the act done, whereas general intent is merely the intent to perform the physical act itself." *People v Lardie*, 452 Mich 231, 240; 551 NW2d 656 (1996).

Taken in a light most favorable to the prosecution, the evidence showed that defendant was an emergency room patient in a hospital on August 20, 1997, where the complainant worked as a registration clerk. The complainant kept her purse in a desk drawer that did not have a lock in the lobby area. On August 23, 1997, defendant was driving an automobile and was pulled over by a police officer for speeding and reckless driving (using the center turn lane to pass other vehicles). Upon being pulled over, the police officer discovered that defendant was driving with a suspended driver's license. Following an inventory search of the automobile, the police found a credit card wallet between the driver's seat and the console. The credit card wallet contained the complainant's credit cards. There was also a Blue Care Network insurance card in the wallet that belonged to another person not known by the complainant. The complainant testified at trial that she did not know defendant and that she did not give defendant permission to have or use her credit cards.

We find that this evidence is sufficient circumstantial evidence from which a juror could reasonably infer that defendant had the requisite intent to knowingly possess the credit cards without the consent of the cardholder. *People v Carines*, 460 Mich 750, 757; 597 NW2d 130 (1999).

Defendant next argues that the trial court abused its discretion by admitting a portion of his medical record that contained identification information. We review the trial court's decision to admit or exclude evidence for an abuse of discretion and will only reverse where there is a clear abuse of discretion. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998). Where the admission of evidence involves a question of law, such as whether a statute or rule of evidence precludes admissibility of the evidence, then it is reviewed de novo on appeal. *People v Lukity*, 460 Mich 484, 488; 596 NW2d 607 (1999).

Before trial, defendant moved in limine to exclude his medical record in its entirety based on the physician-patient privilege. The trial court allowed the prosecution to introduce the patient registration form from the hospital, but excluded evidence of the remainder of the medical record as being "confidential" and, therefore, privileged information. The patient registration form was introduced through the testimony of the hospital's records correspondence clerk. The clerk testified at trial from the patient registration information form that defendant presented to the emergency room on August 20, 1997 at 11:18 a.m. and was discharged at 1:10 p.m. The clerk also testified to the name, date of birth, address, race, and type of insurance stated on the patient registration form. This evidence obviously allowed the prosecution to affirmatively establish that defendant was at the hospital at the same time and place when the complainant was there three days before her credit card wallet was found by the police in defendant's vehicle, thus showing that defendant had access to steal the credit cards.

Defendant argues that this evidence was precluded by the physician-patient privilege, a privilege that defendant did not waive. The physician-patient privilege is controlled by statute, which provides in relevant part:

Except as otherwise provided by law, a person duly authorized to practice medicine or surgery shall not disclose any information that the person has acquired in attending a patient in a professional character, if the information was

necessary to enable the person to prescribe for the patient as a physician, or to do any act for the patient as a surgeon. [MCL 600.2157; MSA 27A.2157.]

Because the physician-patient privilege was not recognized at common law, its scope is controlled by the language of the statute. *Dorris v Detroit Osteopathic Hosp*, 460 Mich 26, 33; 594 NW2d 455 (1999). The purpose of this statute is to protect the confidential nature of the physician-patient relationship and to encourage a patient to make a full disclosure of symptoms and condition. *Id.* The privilege belongs to the patient and therefore can be waived only by the patient. *Id.*, p 34, quoting *Gaertner v Michigan*, 385 Mich 49, 53; 187 NW2d 429 (1971).

In *Dorris*, *supra*, p 28, the Court held that “the names of unknown patients are protected by the physician-patient privilege, and . . . [the] hospitals have a duty to refrain from disclosure.” We also note that MCR 6.201(C)(1) provides that there is generally no right to discover information or evidence that is protected from disclosure by the constitution, statute, or privilege. In the present case, defendant did not explicitly waive his privilege, nor do any of the implied waivers in the statute apply here. Thus, pursuant to *Dorris*, the privilege applies to the patient registration form that was admitted at trial.

Therefore, the question is whether there is any exception to allow the prosecution to admit the evidence contained in the patient registration form. The prosecution relies on *People v Johnson*, 111 Mich App 383; 314 NW2d 631 (1981). In *Johnson*, this Court set forth the following exception to the privilege:

The privilege is to be used for preserving legitimate confidential communications, not for suppressing the truth. Further, where the evidence sought is “demonstrably relevant” to the case at issue, a generalized claim of privilege must yield to the specific need for evidence. [*Id.*, p 389.]

* * *

[I]t is generally held that “(c)ommunications between the physician and patient, however confidential they may be, are held not to be privileged if they have been made in the furtherance of an unlawful or criminal purpose”. 3 Jones, Evidence (6th ed), § 21.29, p 823. [*Johnson*, *supra*, pp 390-391.]

In the present case, defendant’s presence at the hospital was circumstantial evidence of his intent to defraud or cheat the complainant. Defendant’s presence at the hospital made it reasonable for the jury to infer that he stole the credit cards, especially in conjunction with the time frame involved. Thus, the patient registration form identifying defendant’s presence at the hospital was demonstrably relevant to the case as showing that defendant had the opportunity to steal the credit cards. Because it was reasonable to conclude that defendant’s presence at the hospital was in furtherance of a criminal purpose, the medical record was admissible under *Johnson*. Therefore, the trial court did not abuse its discretion in admitting the medical record in this limited manner.

Lastly, defendant argues that the trial court abused its discretion by excluding the portion of defendant’s medical record that contained information relating to his medical condition.

Although defendant initially sought to have the entire medical record excluded, when the patient registration form was admitted through the record clerk's testimony, defense counsel requested that the sheet showing the diagnosis also be included as a "complete record." The trial court did not allow the sheet referencing defendant's diagnosis to be admitted,¹ stating that it contained confidential information. We again review this evidentiary issue for an abuse of discretion. *Starr, supra*, p 494.

Once defendant sought admission of the record, the record was no longer confidential because the privilege was waived, and the record was admissible. *Gaertner, supra*, p 53. Further, the record was relevant because it tended to show that it was more probable that defendant was at the hospital for a legitimate purpose and not solely to steal the credit cards. MRE 401; MRE 402. In other words, admission of the record would have rebutted the prosecution's contention that defendant went to the hospital solely as a ruse to steal the credit cards. Therefore, we find that the trial court abused its discretion in not allowing defendant to admit the diagnosis part of his medical record.

In order to reverse a conviction based on a preserved, nonconstitutional error, the defendant has the burden of showing that it is more probable than not that the error resulted in a miscarriage of justice. *Lukity, supra*, pp 494-495. During cross-examination of the record clerk, defense counsel brought out that defendant complained of difficulty breathing as the reason for his admission to the emergency room. Defendant, however, argues that he was denied the opportunity to show that he was at the hospital for a legitimate medical problem when the medical record containing his diagnosis and other medical information was not entered. Because the part of the medical record that was admitted did reflect that defendant had a legitimate medical problem (difficulty breathing) we find that the error in not admitting the diagnosis sheet was harmless. The jury was made aware of why defendant presented to the emergency room and the exact nature of defendant's reason for presenting to the emergency room was not relevant to any issue. The jury still had to determine whether defendant stole the credit cards, or whether he found them at a nearby gas station as he claimed at trial. The patient registration form was admitted only to show that defendant had the opportunity to steal the credit cards.

Therefore, defendant has not met his burden of showing that it was more probable than not that the jury would have found differently had it been given the information that defendant was present at the hospital for a legitimate medical problem. Consequently, the error in not admitting the diagnosis sheet was harmless and reversal is not required.

Affirmed.

/s/ Jeffrey G. Collins

/s/ Kathleen Jansen

/s/ Brian K. Zahra

¹ We note that defendant was seen by a doctor and diagnosed with acute bronchitis.